

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP MORRIS USA, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

EDWIN S. KNEEDLER
*Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

TABLE OF CONTENTS

	Page
1. The court of appeals' decision conflicts with decisions of this Court and other courts of appeals	1
2. The issue presented here is a vitally important and recurring question that has major consequences for this extraordinarily important case	5
3. The interlocutory character of the court of appeals' erroneous decision, in the circumstances presented here, supports immediate review	6

TABLE OF AUTHORITIES

Cases:

<i>Chan v. Korean Air Lines, Ltd.</i> , 490 U.S. 122 (1989)	7
<i>Ford Motor Co. v. United States</i> , 405 U.S. 562 (1972)	4
<i>International Boxing Club v. United States</i> , 358 U.S. 242 (1959)	4
<i>Korean Air Lines Disaster, In re</i> , 664 F. Supp. 1463 (D.D.C. 1985)	8
<i>Meghrig v. KFC Western, Inc.</i> , 516 U.S. 479 (1996)	3
<i>Mitchell v. Robert DeMario Jewelry, Inc.</i> , 361 U.S. 288 (1960)	1, 2
<i>Norfolk S. Ry. v. Kirby</i> , 125 S. Ct. 385 (2004)	7

IV

Cases—Continued:	Page
<i>People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.</i> , 11 Cal. Rptr. 3d 317 (Ct. App. 2004)	6
<i>Porter v. Warner Holding Co.</i> , 328 U.S. 395 (1946)	1, 2, 3
<i>Schine Chain Theatres v. United States</i> , 334 U.S. 110 (1948))	4
<i>United States v. American Tobacco Co.</i> , 221 U.S. 106 (1911)	4
<i>United States v. Carson</i> , 52 F.3d 1173 (2d Cir. 1995), cert. denied, 516 U.S. 1122 (1996)	4, 5
<i>United States v. Crescent Amusement Co.</i> , 323 U.S. 173 (1944)	4
<i>United States v. E.I. du Pont de Nemours & Co.</i> :	
353 U.S. 586 (1957)	4
366 U.S. 316 (1961)	4
<i>United States v. Philip Morris USA</i> , 316 F. Supp. 2d 6 (D.D.C. 2004)	6
<i>United States v. Sasso</i> , 215 F.3d 283 (2d Cir. 2000)	5
<i>United States v. Turkette</i> , 452 U.S. 576 (1981)	5
<i>Yamaha Motor Corp., U.S.A. v. Calhoun</i> , 516 U.S. 199 (1996)	7
Statutes:	
Act of Jan. 30, 1942, ch. 26, § 205, 56 Stat. 33	3
Fair Labor Standards Act of 1938, 29 U.S.C. 217	3
15 U.S.C. 4	4

Statutes—Continued:	Page
18 U.S.C. 1963(a)	3
18 U.S.C. 1964	2
18 U.S.C. 1964(a)	2, 3, 5
18 U.S.C. 1964(b)	2
28 U.S.C. 1292(b)	7, 8, 9, 10
Miscellaneous:	
67 Fed. Reg. 12,135 (2002)	4
Robert L. Stern et al., <i>Supreme Court Practice</i> (8th ed. 2002)	8

REPLY BRIEF FOR THE UNITED STATES

This Court has repeatedly held that, when Congress authorizes the Executive to request courts to restrain or enjoin unlawful action, the courts may employ all of their equitable powers to enforce compliance and deter future misconduct. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Respondents embrace arguments that this Court has previously rejected to defend an appellate decision that prevents the district court from applying that established principle in the most important civil RICO case that the United States has ever brought. They urge the Court to deny review, even though the decision: (1) squarely conflicts with the decisions of this Court and other courts of appeals (Pet. 9-19); (2) presents an important and recurring issue with major consequences for this important case (Pet. 20-23); and (3) arises in circumstances that warrant immediate review (Pet. 23-28).

1. *The court of appeals' decision conflicts with decisions of this Court and other courts of appeals.* Respondents incorrectly contend (Br. 15-24) that the court of appeals' decision is "entirely consistent" with this Court's decisions in *Porter* and *Mitchell* and that the court of appeals' conceded creation of a circuit conflict is merely "academic" (Br. 24-26).

a. *Porter* and *Mitchell* hold that, when the United States invokes a grant of equitable jurisdiction to enjoin statutory violations, the court may exercise *all* of the powers of equity except those that Congress has *expressly*, or by *necessary and inescapable* inference, withheld. See *Mitchell*, 361 U.S. at 291; *Porter*, 328 U.S. at 398. The underlying rationale of that clear statement rule is itself clear: When Congress charges the Executive to execute a legislative policy and authorizes it to invoke equity in support of that responsibility, Congress has no reason to restrict the court's power to exercise its traditional discretion. Accordingly, "the comprehensiveness of this equitable jurisdiction is not to be denied in the absence of a clear and valid legislative command." *Ibid.*

Respondents refuse to apply that principle to Section 1964’s unambiguous language, which provides that the Attorney General may invoke the court’s equitable jurisdiction “to prevent and restrain violations” by issuing “appropriate orders, including, but not limited to,” a list of illustrative examples. See 18 U.S.C. 1964(a) and (b). Respondents argue, contrary to the very principle that *Mitchell* and *Porter* announce, that Section 1964 does not enable the court’s exercise of equitable discretion here because it does not “by its explicit terms” provide for disgorgement. Br. 16; see Br. 16-18. That reasoning—which the court of appeals embraced—would turn the holdings of *Mitchell* and *Porter* upside down, overturn a principle that has guided congressional action for at least half a century, and impair the Executive’s ability to fulfill Congress’s charge. See *Mitchell*, 361 U.S. at 291-292.¹

Respondents argue that this reading would leave Section 1964(b), which expressly empowers the Attorney General to invoke equity, with no function, and they suggest that the canon against implied private remedies should defeat disgorgement (Br. 18-19). Respondents overlook that the principle of *Mitchell* and *Porter* applies when Congress authorizes *the government* to seek equitable relief. See *Mitchell*, 361 U.S. at 291 (quoting *Porter*, 328 U.S. at 397-398). That is why Congress was careful to specify in Section 1964(b) that “[t]he Attorney General may institute proceedings under this section.” 18 U.S.C. 1964(b). Respondents’ invocation of the general canon against implied *private* rights of action (Br. 18-19 & n.10) is correspondingly misplaced. The principle of *Mitchell* and *Porter*—that Congress’s authorization of the *government* to seek equitable relief enables a court’s full exercise of its equitable powers—stands side-by-side with the general canon that, when Congress provides particular *private* remedies, courts should not imply others. See *Mitchell*, 361 U.S.

¹ The Court faced the very same arguments that respondents make here in *Mitchell* and soundly rejected them. Compare U.S. Br. at 8-9, *Mitchell*, *supra* (No. 39), with Resp. Br. at 3, *Mitchell*, *supra* (No. 39).

at 291 (equity is “even broader and more flexible” when the government vindicates the public interest).²

Respondents contend (Br. 19-20) that Section 1964(a), unlike the statutes at issue in *Porter* and *Mitchell*, contains the required “clear and valid legislative command” that “restricts the court’s jurisdiction in equity” (*Porter*, 328 U.S. at 398). The text of Section 1964(a), however, provides no support for that suggestion. As Judge Tatel pointed out, Section 1964(a) is indistinguishable from the price-control statute involved in *Porter*, which authorized the court to issue “an order enjoining [the proscribed] acts or practices” (§ 205, 56 Stat. 33), and the Fair Labor Standards Act in *Mitchell*, which authorized courts to “restrain violations” of the statute (29 U.S.C. 217). See Pet. App. 51a-60a.

Respondents’ reliance (Br. 20-21) on *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), is unavailing. That case arose in the special context of a private citizen suit seeking what amounted to money damages, rather than a public claim for disgorgement, and the monetary remedy was affirmatively inconsistent with unique features of the statutory scheme. Pet. 16-17; Pet. App. 62a-63a (Tatel, J., dissenting). Thus, Judge Tatel explained, *Mitchell* and *Porter*, not *Meghrig*, “‘directly control’ this case.” *Id.* at 62a.

Respondents also repeat (Br. 22) the court of appeals’ suggestion that RICO’s criminal forfeiture provisions, 18 U.S.C. 1963(a), leave no room for equitable disgorgement, but ignore the specific intent of Congress that the government be permitted to proceed *either* through the criminal law *or* by

² For the same reasons, respondents’ citation (Br. 24) of the government’s brief in *Scheidler v. NOW*, Nos. 04-1244 & 04-1352 (filed Sept. 2, 2005), is far off the mark. As respondents acknowledge, the government has urged in *Scheidler* that Congress did not provide for “injunctive relief in *private* civil RICO suits.” Br. 24 (citing U.S. Br. at 24, *Scheidler*, *supra*) (emphasis added). The government’s brief explains that Section 1964 “authorizes two causes of action: a public enforcement action for equitable relief by the Attorney General and a treble damages action by private parties.” U.S. Br. at 19. See *id.* at 19-27.

seeking equitable relief. See Pet. 15-16. Respondents mistakenly draw on analogies to private antitrust enforcement (Br. 23-24), overlooking that this Court has repeatedly stated, in the context of *government* antitrust enforcement, that Congress’s conferral of power “to prevent and restrain violations,” 15 U.S.C. 4, authorizes a court to fashion appropriate relief that may include, and go beyond, restoring the status quo ante. See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 & n.8 (1972); Pet. App. 64a-65a (Tatel, J., dissenting).³

b. Respondents have no satisfactory answer to the presence of a direct circuit conflict that *all* members of the court of appeals panel acknowledged. See Pet. App. 21a-22a; *id.* at 31a-32a (Williams, J. concurring); *id.* at 59a-60a, 75a-76a (Tatel, J., dissenting). They do not contest that, if this case were pending in the Second or Fifth Circuit, the district court would be entitled to consider a disgorgement remedy.

Respondents instead characterize the panel’s conceded creation of a conflict as “academic,” stating that it presents “no genuine circuit split” because “[n]o appellate court has ever allowed disgorgement in a civil RICO action.” Br. 24-25. But the Second Circuit, in *United States v. Carson*, 52 F.3d 1173 (1995), cert. denied, 516 U.S. 1122 (1996), upheld the

³ See also, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (relief must be “effective to redress the violations”); *International Boxing Club v. United States*, 358 U.S. 242, 253 (1959) (relief should “deprive ‘the antitrust defendants of the benefits of their conspiracy’”, quoting *Schine Chain Theatres v. United States*, 334 U.S. 110, 128 (1948)); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957) (relief must “eliminate the effects” of the unlawful acquisition); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944) (“the government should not be confined to an injunction against further violations”); *United States v. American Tobacco Co.*, 221 U.S. 106, 185 (1911) (the court has “[t]he duty of giving complete and efficacious effect to the prohibitions of the statute”). Respondents mistakenly assert (Br. 23) that the government has contended that the words “prevent and restrain” preclude disgorgement under the antitrust laws. As respondents’ own quote from the *Microsoft* notice indicates, the government stated only that “monetary damages” are not available in government injunctive actions. 67 Fed. Reg. 12,135 (2002).

district court’s authority to order disgorgement by remanding the case to the district court to determine “which disgorgement amounts, if any, were intended solely to ‘prevent and restrain’ future RICO violations.” *Id.* at 1182; see *id.* at 1181 (citing other Second Circuit decisions approving disgorgement). Similarly, the Second Circuit, in *United States v. Sasso*, 215 F.3d 283 (2000), upheld the district court’s power to order a RICO remedy—payment of money into a compliance fund—under the *Carson* disgorgement standard, remanding only for determination of the amount of the payment. See *id.* at 290-292.

More fundamentally, however, the court of appeals’ decision presents a concrete conflict because—as this case illustrates—different courts of appeals have announced dramatically different rules respecting what RICO remedies are available. That difference not only results in divergent outcomes in similar cases arising in different circuits, but it may influence whether some cases will be brought at all.

2. *The issue presented here is a vitally important and recurring question that has major consequences for this extraordinarily important case.* Respondents seek to downplay the vital importance of the legal issue presented here by saying that it is a “policy” question that is “better directed at Congress.” Br. 27-29. But Congress has already decided the policy question. Congress chose language in Section 1964(a) that, under the principles set out in *Porter* and *Mitchell*, clearly authorizes disgorgement. The court of appeals’ refusal to follow this Court’s interpretive principles has thwarted Congress’s intention in enacting RICO “to divest the association of the fruits of its ill-gotten gains.” *United States v. Turkette*, 452 U.S. 576, 585 (1981).⁴

⁴ Respondents’ view (Br. 28 n.14) that *Turkette* was merely referring to the compensated divestiture of lawful interests is incorrect. *Turkette* makes specific reference to the need to deprive wrongdoers of their ill-gotten “revenue” or “gains” derived from criminal conduct, such as “illegal gambling, loan sharking and illicit drug distribution.” See 452 U.S. at 591-593 & n.14.

As the United States’ petition explains, the court’s ruling has far-reaching implications for government RICO enforcement actions. Pet. 20-23. While the government does not routinely seek disgorgement, it is most likely to do so in those instances of racketeering that are most widespread and profitable. The court’s decision will preclude the disgorgement remedy precisely where it is most needed to rectify violations and deter future misconduct. This case illustrates that concern. The United States has alleged, and introduced voluminous evidence to prove, that respondents have engaged in longstanding and pervasive fraud that has greatly compromised public health. Respondents predictably argue that disgorgement is unnecessary. But the United States has consistently emphasized the need for a disgorgement remedy to provide the public with full relief from respondents’ wrongdoing and to deter future misconduct, and the district court has recognized that disgorgement should be among the remedies available in this case. See Pet. App. 90a, 117a-121a, 142a-143a. If this Court does not act, the district court will be unable to invoke that remedy.⁵

3. *The interlocutory character of the court of appeals’ erroneous decision, in the circumstances presented here, supports immediate review.* Respondents, who initiated the interlocutory review process, now argue that this Court should not grant review “at this interlocutory stage of the proceed-

⁵ There is no merit to respondents’ contention (Br. 7-8 & n.3) that the decision of some of the respondents to enter into the 1998 Master Settlement Agreement with the States (MSA) should eliminate the need for any equitable remedy. The district court specifically rejected that contention. See *United States v. Philip Morris USA*, 316 F. Supp. 2d 6, 11-12 (D.D.C. 2004). As the United States has detailed in its post-trial submissions, the federal courts have no assurance of effective MSA enforcement. See Docket No. 5596, U.S. Final Proposed Findings of Fact § V.A.(2)(c) and § V.A.(3) ; Docket No. 5606, U.S. Post-Trial Br. at 164-167; Docket No. 5674, U.S. Post-Trial Reply Br. at 64-69; see also *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 11 Cal. Rptr. 3d 317, 346 n.21, 347 (Ct. App. 2004) (finding evidence demonstrated proof of intent of a respondent to violate MSA’s youth marketing restrictions and remanding for redetermination of sanctions).

ings.” See Br. 9-15. They recite at length what the United States has itself pointed out: The interlocutory character of a decision normally counsels against immediate review (Pet. 23-24). But they have no adequate answer to the government’s core argument: This case would surely warrant review if it were not interlocutory, and the interlocutory character in this instance heightens, rather than diminishes, the need for this Court’s review (Pet. 24-28).

Respondents do not dispute that this Court frequently grants review of interlocutory court of appeals decisions that would qualify for review except for their non-final posture. See Pet. 23-24. They acknowledge (Br. 12 n.6) that this Court has repeatedly done so in situations—like this case—where the court of appeals has decided a remedy issue, through the interlocutory review provisions of 28 U.S.C. 1292(b), in advance of a liability determination. Pet. 26-27. See, e.g., *Norfolk S. Ry. v. Kirby*, 125 S. Ct. 385 (2004); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996); *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989). Respondents have no sound basis for distinguishing those cases, which all involved issues of far less significance than the issue presented here.

Respondents argue that *Norfolk Railway* and *Yamaha* are distinguishable because the district courts in those cases granted stays pending the Section 1292(b) process and those stays ensured that there was “no risk, as there is here, that the remedial question would be mooted by a liability determination.” Br. 12. n.6. It is not the presence of a stay, however, but rather the forbearance of the district court, that is relevant. As the Court’s grant of review in *Chan* indicates, the issuance of a stay is not necessary.⁶

⁶ Respondents point to no evidence that, when the Court granted review in *Chan*, a stay was in effect. Br. 12 n.6.; see 87-1055 J.A. 2-4, 366. Respondents therefore attempt to distinguish *Chan* on the ground that the issue there—whether the airline lost the benefit of the Warsaw Convention’s \$75,000 liability limitation because it printed the notice in the wrong size type—would not be rendered moot because “the defendant was ‘subjec[t] . . . to virtual strict liability’ with only the ‘amount of damages’ left to be determined.” Br. 12

In this complex and compellingly important case, the district court decided to continue with the trial and post-trial briefing during the appellate process, but it has set no schedule for issuing its judgment, and there is no reasonable prospect that it would take action to moot this Court's review. The reality of the matter is this: The district court sought conclusive appellate guidance on a "controlling question" respecting remedies, and it authorized the Section 1292(b) petition for interlocutory review only because it was vitally interested in obtaining appellate resolution of that remedies issue to aid in its "ultimate termination of the litigation." 28 U.S.C. 1292(b). There is no reason to expect that the district court would authorize a Section 1292(b) appeal and then irrationally terminate the litigation without waiting for this Court's authoritative response to the request for appellate guidance.⁷

The Court's decision whether to grant review should not be guided, therefore, by whether a stay is formally in place, but rather by whether the case presents an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Robert L. Stern et al., *Supreme Court Practice* 259 (8th ed. 2002). In this case, a divided court of appeals rendered a decision on an important issue that conflicts with

n.6 (quoting *In re Korean Air Lines Disaster*, 664 F. Supp. 1463, 1477 (D.D.C. 1985)). The court actually stated, "[w]hile the Montreal Agreement subjects air carriers to virtual strict liability, air carriers are *not* automatically liable for an amount of \$75,000," adding that, "[s]ince the amount of damages must be established on an individual basis, there are still material issues of fact which remain to be tried." *Ibid.* (emphasis added). If the court found that the plaintiffs failed to meet remaining liability requirements, or failed to establish damages in excess of \$75,000, the issue before the Court would have become moot. Respondents' basis for distinguishing *Chan* is accordingly unpersuasive.

⁷ In light of the freshness of the evidentiary presentations at trial, the United States has urged the district court to act expeditiously and to consider promptly resolving respondents' liability in favor of the government before turning to the complex remedial issues, which can await this Court's resolution of the disgorgement issue. U.S. Post-Trial Br. at 2-3. A determination that respondents are liable plainly would not moot the issue before this Court.

the decisions of this Court and other courts of appeals. The interlocutory character of that decision heightens the need for review because the Section 1292(b) review process—which respondents initiated—has not “advance[d] the ultimate termination of the litigation” (28 U.S.C. 1292(b)), but instead has gone seriously awry and produced an erroneous intermediate appellate court ruling that, if left in place, would provide misleading guidance and force the district court to fashion a remedy based on fundamentally mistaken principles of law.⁸

Respondents contend (Br. 11) that the problems they now associate with immediate review outweigh the benefits, but that is not so. There is no realistic likelihood that, if the Court grants review, the district court would take any action that would moot the Court’s resolution of the issue. Instead, the district court—which has already determined that it would benefit from appellate guidance on the disgorgement issue and is no doubt keenly aware of this petition for a writ of certiorari—would respect this Court’s prerogatives and take no action that would otherwise compromise an orderly appellate process. Respondents’ mootness and “awkwardness” concerns (Br. 15) are chimerical.

Instead, this case will likely follow one of two routes. If this Court *grants* review: (a) the Court would decide the case no later than June 2006 (and perhaps earlier); (b) the district court would take whatever action is necessary in response to the Court’s decision and issue a final judgment promptly after this Court’s resolution; and (c) the appeal process would go forward with the certified remedies questions fully resolved. If this Court *denies* review: (a) the district court would decide

⁸ Respondents, who obtained interlocutory review through “questionable tactics,” see Pet. App. 42a-43a, 48a-49a (Tatel, J., dissenting), now contend that “[t]he reasons for interlocutory review by the D.C. Circuit no longer apply” because “[t]he trial is now over” and “the entire case is pending for decision before the district court.” Br. 11. But the district court must still *decide* the case, and there are substantial “practical benefits” (*ibid.*) for the district court in knowing next year, rather than three or more years from now, whether it will need to receive additional testimony and briefing on remedies.

the liability and remedies issues, bound by a ruling that improperly restricts the remedies it may consider; (b) the appeal process would go forward, but the district court's remedial judgment would be infected with a fundamental error that would require a remand; and (c) if the Court then decides to correct the error, the inherent delays would ensure that any remand proceedings would not take place until well into the future and certainly no sooner than late 2008. See Pet. 26 n.10.

Given the two likely scenarios, and the fact that the court of appeals' questionable decision has already generated a conflict among the courts of appeals, this Court should review the court of appeals' decision now. That mistaken decision will not only prevent the district court from formulating appropriate remedies at this time and necessitate a future remand if it is corrected later, but it will continue to misdirect other courts and constrain the government's ability to seek full relief in future civil RICO cases. Prompt review by this Court accordingly would fulfill the overarching objectives of Section 1292(b)'s provision for interlocutory review: to resolve a "question of law as to which there is * * * difference of opinion," and to 'materially advance the *ultimate* termination of the litigation.' 28 U.S.C. 1292(b) (emphasis added).

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General

SEPTEMBER 2005